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IN THE
COURT OF APPEALS OF INDIANA

SHANE N. DEBRULAR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 61A01-0811-CR-545
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PARKE CIRCUIT COURT
The Honorable Sam A. Swaim, Judge
Cause No. 61C01-0709-FC-195

March 16, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Shane N. Debrular appeals the twenty-year sentence that was imposed following his conviction for Aggravated Battery,[1] a class B felony. Specifically, Debrular argues that the trial court erroneously failed to consider certain mitigators and identified several improper aggravating circumstances when imposing the sentence. Debrular also maintains that the sentence is inappropriate in light of the nature of the offense and his character. As a result, Debrular argues that we should revise his sentence to ten years. Concluding that Debrular was properly sentenced, we affirm the judgment of the trial court.

FACTS

On November 29, 2007, Debrular was charged with aggravated battery, a class B felony. The charging information alleged that

> [O]n or about September 23, 2007, in Park County, State of Indiana, Shane N. Debrular did knowingly inflict injury on Erica B. Debrular that caused protracted loss or impairment of the function of a bodily member or organ.

Appellant's App. p. 24.[2] The State also charged Debrular with domestic battery, a class D felony. That charge stemmed from the same incident, and included an allegation that Debrular beat Erica, his former wife, "in the presence of a child less than 16 years of age, knowing that the child was present." Id. at 9.

On September 8, 2008, Debrular entered into a plea agreement with the State, wherein he agreed to plead guilty to aggravated battery in exchange for the State's

[1] Ind. Code § 35-42-2-1.5(2).

[2] The State originally charged this offense as a class C felony.

dismissal of the domestic battery count. The agreement also provided that the executed portion of Debrular's sentence would not exceed twelve years. The trial court accepted the plea agreement and entered a judgment of conviction.

In determining the sentence, the trial court identified the following aggravating and mitigating circumstances:

> The injury to the victim was significant and greater than necessary to prove the elements of the offense. The defendant has a history of delinquent or criminal activity as outlined in the presentence report. The offense occurred in the presence of the victim's children. Pursuant to the victim's testimony regarding the defendant's attitude he has failed to show remorse and take the cause seriously. Court finds that testimony presented and comments from counsel would suggest a mitigating factor in that the crime is unlikely to recur given the parties will have no communication in the future. Court finds the aggravating circumstances outweigh the mitigating. . . .

Id. at 5. The trial court then sentenced Debrular to twenty years of incarceration with eight years suspended.[3] Debrular now appeals.

DISCUSSION AND DECISION

I. Aggravating Circumstances

Debrular argues that his sentence must be set aside because the trial court improperly identified the extent of Erica's injuries as an aggravating factor in determining what sentence to impose. Specifically, Debrular maintains that because the injuries were an element of the charged offense, they "could not also be used as an aggravating circumstance." Appellant's Br. p. 4.

[3] Pursuant to Indiana Code section 35-50-2-5, the sentencing range for a class B felony is from six to twenty years, with an advisory sentence of ten years.

In addressing Debrular's claims, we initially observe that sentencing decisions rest within the discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. 868 N.E.2d at 490. One way in which a trial court may abuse its discretion is by finding aggravating and mitigating factors that are not supported by the record, are improper as a matter of law, or the court fails to include factors that are clearly supported by the record and advanced for consideration. Id. at 490-91.

The trial court's sentencing statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. Id. at 490. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Id. However, even if a particular aggravator is deemed improper, remaining factors that are proper will support the sentence. Hollins v. State, 679 N.E.2d 1305, 1308 (Ind. 1997). Moreover, only one aggravator is necessary to support an enhanced sentence. Williams v. State, 891 N.E.2d 621, 634 (Ind. Ct. App. 2008).

Debrular correctly observes that a material element of a crime may not be used as an aggravating factor to support an enhanced sentence. McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007). However, when evaluating the nature of the offense, the trial court may properly consider the particularized circumstances of the factual elements as

aggravating factors. Id. The trial court must then detail why the defendant deserves an enhanced sentence under the particular circumstances. Id.

In this case, the trial court considered the facts that Debrular struck Erica on the head twenty or thirty times in the course of approximately ten minutes. Tr. p. 6, 15-18. Erica's injuries included nerve and soft tissue damage to the left side of her face and nasal cavity, which will remain chronic for the rest of her life. Id. at 6-7, 15-16. Erica also suffered emotional damage—as did her two children who witnessed the beating. In light of these circumstances, it is apparent that the trial court considered the significant harm, injury, and damage that the victims suffered and detailed the particularized circumstances of the offense. Thus, we reject Debrular's contention that the trial court improperly identified the elements of the crime as an aggravating factor. See Sipple v. State, 788 N.E.2d 473, 482 (Ind. Ct. App. 2003) (holding that the trial court's explanation was significantly more than the mere recitation of the elements of the offense, and adequately supported the finding of the aggravating circumstance); Armstrong v. State, 742 N.E.2d 972, 981 (Ind. Ct. App. 2001) (holding that the trial court's sentencing statement "makes clear that it was not the pointing or shooting of the handgun that was the aggravating circumstance but the manner in which those offenses were committed" and "[t]his was a proper use of the nature and circumstances of the crimes committed as an aggravating factor.").

II. Mitigating Circumstances

Debrular also argues that his sentence must be set aside because the trial court did not identify certain mitigating circumstances that are apparent in the record. Specifically,

Debrular maintains that the trial court should have identified his decision to plead guilty and the hardship that incarceration would have on his children as mitigating factors.

It is within the trial court's discretion to determine the existence of a significant mitigating circumstance. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006). An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer, 868 N.E.2d at 493. In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Banks, 841 N.E.2d at 658. However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Id.

With regard to Debrular's contention that his sentence must be set aside because the trial court did not identify his decision to plead guilty as a mitigating factor, our Supreme Court has determined that a guilty plea demonstrates acceptance of responsibility for a crime and must be considered a mitigating factor. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995). However, a plea bargain does not constitute a substantial mitigating factor when the defendant has already received a significant benefit from the plea agreement. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). Moreover, a guilty plea may not rise to the level of significant mitigation where the evidence against the defendant is such that the decision to plead guilty is merely a pragmatic one. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005).

As discussed above, the State originally charged Debrular with two counts of battery. Pursuant to the plea agreement, the State dismissed one count, and the executed portion of the sentence on the remaining count was "capped" at twelve years. Appellant's App. p. 33-35. In light of these circumstances, it is apparent that Debrular received a benefit in exchange for his guilty plea, inasmuch as he could have been sentenced to a twenty-year term of incarceration had he been found guilty of that offense following a trial. I.C. § 35-50-2-5.[4] As a result, we cannot say that the trial court abused its discretion when it declined to identify Debrular's guilty plea as a significant mitigating factor. Sensback, 720 N.E.2d at 1165.

As for Debrular's claim that the trial court erred in failing to identify the hardship that his incarceration would have on his children as a mitigating circumstance, we note that jail is always a hardship on dependents. Vazquez v. State, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005). Moreover, our Supreme Court has observed that "many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999).

In this case, Debrular claimed that he had two children from a previous marriage. Although Debrular contends that he was ordered to pay weekly child support in the amount of $134, the PSI reflects that Debrular was unemployed and quit his most recent

[4] Although Debrular claims that he received no benefit from the State's dismissal of the domestic battery counts because of double jeopardy concerns, he concedes that the provision set forth in the plea agreement "capping" the executed portion of his guilty plea at twelve years was, indeed, a benefit to him. Appellant's Reply Br. p. 1.

job as a truck driver because of "a decline in the work load." PSI at 39. Thus, he has failed to demonstrate the degree to which the children rely upon him for support. See Roney v. State, 872 N.E.2d 192, 205 (Ind. Ct. App. 2007) (holding that the defendant failed to show that any hardship suffered by his children is "undue" in the sense that it is any worse than that suffered by any child whose father is incarcerated), trans. denied. As a result, Debrular's claim fails.

III. Inappropriate Sentence

Debrular also claims that his sentence is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As noted above, Debrular received the maximum twenty-year sentence for aggravated battery, a class B felony, with twelve years executed and eight years suspended. As for the nature of the offense, the record reflects that Debrular inflicted severe injuries upon Erica that has resulted in permanent nerve damage, soft tissue damage, chronic pain, and hearing loss. Tr. p. 16. Moreover, Erica's children observed the beating. Id. at 16-17.

Turning to Debrular's character, the record reflects that he has a history of criminal and delinquent activity and two probation violations. PSI at 38. While in the United States Army, Debrular was found guilty of several drug possession offenses. As a result, he was confined in the correctional facility at Fort Lewis for two years.

Thereafter, Debrular was discharged from the army for "bad conduct." Id. at 41. In essence, Debrular has shown an utter disregard for the law and its consequences.

Reflective of Debrular's angry and violent character is the fact that he inflicted severe injuries upon Erica as her children watched. The heinous nature of the aggravated battery against Erica is staggering, the attack was brutal, and Erica's injuries were extremely serious and life-altering. In light of these circumstances, Debrular has failed to persuade us that his twenty-year sentence with eight years suspended is inappropriate.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.